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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GRUMMAN AEROSPACE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

SHIPBUILDERS COUNCIL OF AMERICA BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER, GRUMMAN AEROSPACE CORPORATION

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SHIPBUILDERS COUNCIL OF AMERICA BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER, GRUMMAN AEROSPACE CORPORATION

The Shipbuilders Council of America, with the consent of all parties, submits this brief *amicus curiae* pursuant to Rule 37.2 of the Rules of this Court in support of the petition for a writ of certiorari filed by Grumman Aerospace Corporation.

THE AMICUS AND ITS INTERESTS

The Shipbuilders Council is a voluntary, nonprofit national trade association composed of fifty-three firms, corporations, partnerships and organizations lo-

cated in the United States that are involved in the shipbuilding industry. The Council was founded in 1920 for the purposes of (i) promoting a sound private shipbuilding and ship repairing industry in the United States, (ii) promoting an adequate mobilization potential of privately-owned shipbuilding, ship repairing and allied industries for availability in time of national emergency, and (iii) affording a means of cooperation between Government and industry in matters of national concern.

A major portion of the business of the Shipbuilders Council's members involves contracts with the federal Government, including contracts for the construction and repair of vessels for the United States Navy and Coast Guard, and for the development and production of communication, propulsion, radar, electronic, computer and other on-board systems for such vessels. Members of the Shipbuilders Council are currently performing contracts with the federal Government valued at many billions of dollars. These members are also involved in administrative or court proceedings resulting from the Government's denial of certified claims submitted under their contracts with the Government, or they have claims awaiting decisions by Government contracting officers. In either case, their claims were certified and, therefore, involve the same claim certification issue presented to this Court by Grumman Aerospace's petition. As a result, these claims will be directly affected by this Court's action on the petition.

While the decision below will adversely affect all non-individual Government contractors, its impact will be particularly acute for contractors who build ships for the Government because of an eighteen-month

statute of limitations applicable to contractor claims under Government shipbuilding contracts. 10 U.S.C. § 2405. Such contracts entered into after December 7, 1983 are not eligible for price increases—whether sought in a claim, request for equitable adjustment, or demand for payment—if the claim forming the basis for such an increase arose "out of events occurring more than 18 months before the submission of the claim, request, or demand." 10 U.S.C. § 2405(a). The statute further provides:

> A claim, request, or demand shall be considered to have been submitted only when the contractor has provided the certification required by section 6(c)(1) of the Contract Disputes Act of 1978 . . . .

10 U.S.C. § 2405(b).

The Navy interprets 10 U.S.C. § 2405 as requiring a "properly certified" claim in order to toll the running of this statute of limitations. As a result of the decision of the court below, therefore, shipbuilding claims now under administrative or judicial review are in jeopardy of being rejected on jurisdictional grounds even though the claims were "properly certified" under the law as it had been interpreted by the contract appeals boards and the Claims Court as of the time the certification was made. Because the government typically does not challenge the claim certification until well into appeal proceedings—often on the eve of trial—the eighteen-month limitations period will likely have already elapsed before the issue is even raised. Under the decision below, then, many meritorious shipbuilding claims could be forever barred.

The Shipbuilders Council and its members thus have a direct and substantial interest in the issues pre-

sented to this Court by Grumman Aerospace's petition and in urging this Court to review and reverse the decision of the court below.

REASONS FOR GRANTING THE PETITION

The decision of the court below presents important questions arising under the Contract Disputes Act of 1978 ("CDA"), Pub. L. No. 95-563, 92 Stat. 2383 (1978), *codified at* 41 U.S.C. §§ 601 *et seq.*, that have not yet, but should be, decided by this Court. In particular, the Court is asked to resolve the meaning of the statutory requirement imposed by Congress in the CDA that contract claims against the government in excess of $50,000 be certified by the "contractor." CDA § 6(c)(1), 41 U.S.C. § 605(c)(1). A second, related question concerns the force and effect of a regulation originally promulgated in 1980 by the Office of Federal Procurement Policy ("OFPP"), now found in the Federal Acquisition Regulation ("FAR") 33.207(c)(2), 48 C.F.R. §33.207(c)(2), which purports to define what categories of employees of a non-individual "contractor" must certify claims in order to satisfy the CDA's statutory requirement.

The court below held, *inter alia*, (i) that the FAR certification regulation was validly promulgated by OFPP because it allegedly filled a gap left by Congress in the CDA, (ii) that the regulation, therefore, has the force and effect of law, and (iii) that, if a certifier fails to match the *regulation's* definition of who must certify Government contract claims, the agency contract appeals boards are stripped of their *statutory* subject matter jurisdiction to adjudicate such claims. Petition, Appendix ("App.") 4a-9a. The court below found that Grumman Aerospace's certifier did

not match the regulatory definition, as interpreted by the court, and vacated the favorable decision that Grumman Aerospace had obtained on the merits before the Armed Services Board of Contract Appeals ("ASBCA"). App. 9a-11a.

In holding that the FAR certification regulation defines the subject matter jurisdiction of the tribunals charged with adjudicating Government contract claims under the CDA, the court below has condoned manipulation of the jurisdiction of contract appeals boards by the procuring agencies litigating against contractor claims before those boards. Such a result directly contravenes the will of Congress as expressed in the CDA and its legislative history, resurrects the precise evil that Congress sought to purge from the procurement process in enacting the CDA and permits, if not encourages, the procuring agencies to subvert the laudable, remedial purposes of the CDA. The decision of the court below also allows these procuring agencies to define, separately for their own agency contracts, the subject matter jurisdiction not only of the contract appeals boards, but also of the United States Claims Court—a bizarre result never intended by Congress.

The court below reached these erroneous results by misreading and misapplying controlling precedent of this Court, ignoring the express language and intent of Congress in defining OFPP's limited role in the CDA statutory scheme, and thereby mistakenly concluding that it was required to accord deference to OFPP in its promulgation of the FAR certification regulation at issue.

These failures of the court below constitute special circumstances calling for review and reversal by this Court.

I. IMPORTANT POLICIES AND OBJECTIVES OF THE CONTRACT DISPUTES ACT ARE FRUSTRATED BY THE DECISION OF THE COURT BELOW

Since the earliest days of our Nation, the Government has purchased goods and services from the private sector. From the beginning and continuing until the present day, the procurement process has been beset by problems including—to a greater or lesser degree—profiteering, influence peddling, fraud, mismanagement, inefficiency, and inconsistency. On several occasions over these two hundred years, the procurement process and its attendant problems have been studied by Congress and various commissions (*e.g.*, Dockery, Keep, First Hoover, and Second Hoover Commissions), often yielding proposals to reform and improve the process.[1]

The latest and most comprehensive such study was conducted at the direction of Congress by the Commission on Government Procurement, created by Act of November 26, 1969, Pub. L. No. 91-129, 83 Stat. 269 (1969). This Commission was charged with the responsibilities of (i) studying and investigating the entire federal Government procurement process and (ii) recommending to Congress methods "to promote the economy, efficiency, and effectiveness in the procurement of goods, services and facilities by and for the executive branch of the Federal Government . . . ." *Id.*, 83 Stat. at 269-270. "Until that time

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[1] *See Report of the Commission on Government Procurement*, December 1972 ("*Report*"), Vol. 1 at 163-184.

there had been no comprehensive examination devoted exclusively to the system by which claims by and against the Government with regards to Government contracts should be adjudicated." S. Rep. No. 95-1118, 95th Cong. 2d Sess. (1978) at 4, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5235, 5238.

Over a two year period, the Commission collected and analyzed massive amounts of material and information derived from procurement reports, congressional testimony, documents, comments, opinions, questionnaires, interviews and public meetings. *See Report*, Vol. 1 at vii-viii. In December 1972, the Commission reported the results of its extensive study to Congress, making 149 specific recommendations for improving the procurement process. *Report*, Vol. 1 at 185-199. The Commission's recommendations that were directed toward contract disputes, *Id.* at 197, formed the framework for consideration and eventual enactment of the CDA by Congress six years later. *See* S. Rep. No. 95-1118 at 1-5.

In the CDA, Congress authorized agencies to establish boards of contract appeals, CDA § 8(a)(1), 41 U.S.C. § 607(a)(1), and granted to those boards jurisdiction "to decide any appeal from a decision of a contracting officer." CDA § 8(d), 41 U.S.C. § 607(d). Concurrent jurisdiction over such matters was also given to the United States Court of Claims (now the United States Claims Court). CDA § 14(i), 92 Stat. 2383, 2391, *amending* 28 U.S.C. § 1491. The legislative history of the CDA leaves no doubt that Congress was creating order and uniformity out of the preexisting disarray and, in particular, was seeking to eliminate procedural and substantive inconsistencies in the adjudication of contract claims by pre-

venting the agencies from manipulating the procurement disputes process to their own separate and individual ends.

> The Contract Disputes Act of 1978 provides a fair, balanced, and *comprehensive statutory* system of legal and administrative remedies in resolving Government contract claims.
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> The present means for resolving disputes under Government contracts is a mixture of contract provisions, agency regulations, judicial decisions, and statutory coverage. Basically the methods and forums for handling such disputes exist by executive branch fiat—that is, by the insertion of contract terms specifying how disputes in specific areas will be resolved—and by agency regulations governing the procedural and substantive adjudication of disputes.
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> * * * * *
>
> In large part, the present Government contract remedies system has developed in an unplanned manner. Many rules and requirements that govern the system are the result of unstructured reactions to various events and decisions. The predilections of different agencies . . . bring forth new provisions and procedures that are restrictive and uncoordinated.
>
> * * * * *
>
> While the existing dispute system may have been satisfactory in earlier years, the complexity of Government procurement demands the enactment of a more efficient procedure. How pro-

> curement functions has a far-reaching impact on the economy of our society and on the success of many major Government programs. Both can be affected by the existence of competition and quality contractors—or by the lack thereof. The way potential contractors view the disputes-resolving system influences how, whether, and at what prices they compete for Government contract business.

S. Rep. No. 95-1118 at 1-4 (emphasis added)[2]

Ignoring this clear expression of congressional intent, the court below sanctioned the very agency conduct that Congress sought to eliminate in enacting the CDA. For purposes of evaluating whether the ASBCA had statutory subject matter jurisdiction, the court below deferred to OFPP in its promulgation of the claim certification regulation and to the procuring agency's argument that the contractor's certification did not satisfy that regulation. App. 4a-7a. Yet, this result not only runs directly afoul of the express intent of Congress to *divest* the agencies of their previous power to define the jurisdiction of the boards through disputes clause requirements and regulations,

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[2] Interestingly, when the CDA was in draft form, the Department of Defense sought to preserve its previous ability to manipulate board jurisdiction: "We believe that leaving applicability of the Disputes procedure to procurement and other departmental regulations should continue." *See* Letter of General Counsel of the Department of Defense dated June 23, 1978 to Hon. Peter W. Rodino, Jr., Chairman, Committee on the Judiciary, House of Representatives, attached to H.R. Rep. No. 95-1556, 95th Cong., 2d Sess. at 52 (Sept. 8, 1978). Congress expressly rejected DOD's request: "[T]he bill provides a new statutory basis for Agency Boards of Contract Appeals." *Id.* at 19.

but it also creates the potential for further subversion by the agencies of the CDA's uniform contract dispute resolution process.

Numerous problems are engendered when an agency, on the basis of its interpretation of its own regulation, can challenge the subject matter jurisdiction of the forum that is adjudicating a contractor's claim against the same agency. Congress determined that creating a new, uniform statutory basis for the jurisdiction of the contract appeals boards would eliminate those problems. Now, under the decision of the court below, agencies litigating contractor claims, whether in the Claims Court or any contract appeals board, are free at any time in the course of the proceeding to challenge a claim certification on the ground that the agencies' interpretation of the claim certification regulation suggests that an "improper" person had certified the claim, and thereupon demand dismissal of the appeal.

Such agency challenges come with ill grace, because the agency's contracting officer must have already determined in the first instance that a proper person had certified the claim in order to render a final decision, which is a prerequisite to an appeal. Thus, an agency is free to manipulate at will the jurisdiction of a board, or the Claims Court, within a single case to the prejudice of the contractor: first, the agency, through its contracting officer, permits the appeal to be filed by issuing a final decision, but then later, through its litigation counsel, contests the validity of the certification by a *post hoc* reapplication of the regulation and demands dismissal. This is precisely what happened to Grumman Aerospace in this case and to other government contractors in other cases.

The agency's motivation for such duplicity is that it does not have to pay CDA statutory interest for the period during which it delays contesting jurisdiction[3] and, in the case of shipbuilding claims subject to the eighteen-month statute of limitations in 10 U.S.C. § 2405, the agency can avoid all liability for the contractor's claim if that statute has run.

Under the decision of the court below, the procuring agencies are free to manipulate the procurement process in yet another way that also clearly contravenes the will of Congress in enacting the CDA. The claim certification regulation is incorporated in the FAR and, under the regulatory scheme, each procuring agency subject to the FAR may promulgate its own supplement thereto. FAR 1.301, 48 C.F.R. § 1.301.[4] The decision of the court below now allows

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[3] In the CDA, Congress provided that "[i]nterest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 6(a) from the contractor until payment thereof." CDA § 12, 41 U.S.C. § 611. However, in defining "claim" for its purposes, the FAR provides that a claim exceeding $50,000 "is not a claim under the [CDA] until certified as required by the Act *and* 33.207." FAR 33.201, 48 C.F.R. § 33.201 (emphasis added).

[4] *See* 48 C.F.R. Ch. 3 (Health and Human Services); 48 C.F.R. Ch. 4 (Agriculture); 48 C.F.R. Ch. 5 (General Services Administration); 48 C.F.R. Ch. 6 (State); 48 C.F.R. Ch. 7 (Agency for International Development); 48 C.F.R. Ch. 8 (Veterans Affairs); 48 C.F.R. Ch. 9 (Energy); 48 C.F.R. Ch. 10 (Treasury); 48 C.F.R. Ch. 12 (Transportation); 48 C.F.R. Ch. 13 (Commerce); 48 C.F.R. Ch. 14 (Interior); 48 C.F.R. Ch. 15 (Environmental Protection Agency); 48 C.F.R. Chs. 16 and 17 (Office of Personnel Management); 48 C.F.R. Ch. 18 (National Aeronautics and Space Administration); 48 C.F.R. Ch. 19 (United States Information

each agency subject to the FAR to promulgate its own supplemental claim certification regulation to further define and refine who must certify claims under contracts *with that agency*, so long as the supplemental definition allegedly fills a gap in the CDA and is not in conflict with or inconsistent with the FAR content. FAR 1.304, 48 C.F.R. § 1.304. This, of course, marks a return to the very lack of uniformity in the "procedural and substantive adjudication of disputes" that Congress purged from the procurement process when it enacted the CDA thirteen years ago.[5]

These consequences of the decision below, so plainly contrary to the will of Congress, demand correction by this Court.

Agency); 48 C.F.R. Ch. 22 (Small Business Administration); 48 C.F.R. Ch. 24 (Housing and Urban Development); 48 C.F.R. Ch. 25 (National Science Foundation); 48 C.F.R. Ch. 28 (Justice); 48 C.F.R. Ch. 29 (Labor); 48 C.F.R. Ch. 34 (Education); 48 C.F.R. Ch. 35 (Panama Canal Commission); C.F.R. Ch. 44 (Federal Emergency Management Agency); and 48 C.F.R. Ch. 57 (African Development Foundation). In the case of the Department of Defense, it has promulgated its own supplement to the FAR ("DFARS"), 48 C.F.R. Ch. 2, and the Army, Navy and Air Force have in turn promulgated their own supplements to the DFARS. 48 C.F.R. Chs. 51, 52 and 53.

[5] The FAR certification requirement has already produced the anomaly that CDA claims submitted under contracts subject to the FAR are judged by the FAR's restrictive standard of who must certify claims on behalf of non-individual contractors, while CDA claims submitted under contracts not subject to the FAR are judged by the rational standard that a certifier authorized to bind the "contractor" satisfies the will of Congress in the CDA. *See Little River Lumber v. United States*, 21 Cl.Ct. 527, 533-34 (1990); *Alaska Lumber and Pulp Co., Inc.*, AGBCA No. 82-107-1, 1990 Westlaw 34704 (March 20, 1990).

II. THIS COURT SHOULD EXERCISE ITS SUPERVISORY JURISDICTION TO CORRECT THE UNPRECEDENTED AND PATENTLY ERRONEOUS READING GIVEN THE CONTRACT DISPUTES ACT AND THE FAR CERTIFICATION REGULATION BY THE COURT BELOW

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court articulated the principles governing judicial review of interpretations by administrative agencies of the statutes they are entrusted by Congress with the duty to administer. Before applying this Court's *Chevron* principles of deference to agency action, however, a reviewing court must first determine whether Congress has delegated to the agency a duty to administer the statute in question or, to put it differently, whether Congress has empowered the agency to regulate in the first place.[6] In this case, the court below

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[6] *See, e.g., Chevron*, 467 U.S. at 842, 844 (EPA accorded deference since it was entrusted to administer statutory scheme of Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685); *Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 118 & n.2, 125 (1985) (EPA accorded deference since it was entrusted to administer Clean Water Act, 33 U.S.C. § 1251 *et seq.*); *Blum v. Bacon*, 457 U.S. 132, 139-140 & n.8, 141-142 (1982) (Secretary of Health, Education and Welfare accorded deference since he was charged with administering federal funding for emergency assistance programs under Title IV-A of Social Security Act, 42 U.S.C. § 603(a)(5)); and *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 45 (1981) (Commission accorded deference because Congress vested it with primary and substantial responsibility for enforcing Federal Election Campaign Act of 1971, 2 U.S.C. ¶¶ 431 *et seq.*, and provided the agency with extensive rulemaking and adjudicative powers). By contrast, regulatory interpretations of a statute made by an agency that has *not* been delegated specific responsibility to

made no such inquiry and made no such determination. Instead, the court improperly invoked *Chevron* and thereby erroneously concluded that it was required to defer to the agency's judgment and to its regulation. App. 4a-7a. Had the court not ignored the critical, indispensable first step of a proper *Chevron* analysis, it would have quickly discerned that the FAR certification regulation is entitled to no deference at all and cannot, therefore, have the force and effect of law.

The *only* authority that Congress granted to OFPP in the CDA statutory scheme was the specific and strictly limited authority to "issue guidelines with respect to criteria for the establishment, functions, and procedure of the agency boards." CDA § 8(h), 41 U.S.C. § 607(h). Congress did not empower OFPP to administer the CDA, or to promulgate any regulation whatsoever, much less a binding legislative regulation defining the subject matter jurisdiction of the courts and contract appeals boards to adjudicate contract disputes. The language of the CDA could not be clearer, but even even if resort to the legislative history of the CDA were appropriate, it too affirms that the authority granted to OFPP was strictly limited.[7]

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administer that statute are *not* entitled to deference under the *Chevron* principles. *See Crandon v. United States*, 110 S.Ct. 997, 1011 (1990) (Scalia, J., concurring).

[7] Originally, the bill reported out of committee in the Senate, directed OFPP to "issue *rules and regulations* with respect to" the establishment, functions, and procedures of the agency boards. 124 Cong. Rec. S18636 (daily ed. Oct. 12, 1978) (emphasis added). Even at that, OFPP's role was unmistakably limited, almost clerical in nature, *i.e.*, "developing . . . workload study formats; being the central clearing point for collection of

The specific claim certification provision of the CDA at issue in this case, CDA § 6(c)(1), 41 U.S.C. § 605(c)(1), has no legislative history. The provision is not discussed in the committee reports because it was added by amendment on the Senate floor—without explanation or discussion—on the day the Senate passed the legislation and the day before the House passed it. *See* 124 Cong. Rec. 36266, 37074-76 (1978). The only guidance as to the meaning and intent of this provision insofar as this case is concerned, therefore, is the statute's plain language that claims in excess of $50,000 shall be certified by the "contractor" and the statute's definition of "contractor" for these purposes as "a party to a Government contract other than the Government." CDA §§ 6(c)(1) & 2(4), 41 U.S.C. §§ 605(c)(1) & 601(4).

It is against this legislative backdrop that OFPP promulgated the claim certification regulation that lies at the heart of this case and which is now found at FAR 33.207(c)(2), 48 C.F.R. § 33.207(c)(2). Section 16 of the CDA provides that the "Act shall apply to contracts entered into one hundred twenty days after the date of enactment." *See* 41 U.S.C. § 601 (note). On at least three separate occasions, OFPP relied on this provision as its authority to issue proposed rules, stating that the proposed contract and regulatory coverage was necessary because the CDA required cer-

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. . . agency's workload studies; and acting in concert with the agency head in the establishment of each board." S. Rep. No. 95-1118 at 27. Later, on the Senate floor the words "rules and regulations with respect to" in the bill were eliminated and replaced by the words "*guidelines with respect to the criteria for*." 124 Cong. Rec. S18640 (daily ed. Oct. 12, 1978) (emphasis added).

tain changes to clauses and procurement regulations of the procuring agencies by March 1, 1979 (one hundred twenty days after the CDA was signed into law on November 1, 1978). *See* Proposed Rules, 44 Fed. Reg. 5,219 (Jan. 25, 1979); Interim Final Rules, 44 Fed. Reg. 12,519 (March 7, 1979); Final Rules and Proposed Contract Disputes Clause, 44 Fed. Reg. 34,228 (June 14, 1979).

The interim final rules set forth an interim disputes clause, including a requirement that contractors certify claims. 44 Fed. Reg. at 12,524. When it published the final rules, OFPP modified the interim disputes clause and invited comments. 44 Fed. Reg. at 34,229. Up to and including this point, however, both the proposed rules and interim disputes clauses required "*the contractor*" to certify claims, in exactly the same language as Congress had specified in the CDA.

Then, on May 9, 1980, OFPP issued what it termed a "policy directive" (OFPP Policy Letter 80-3), again based on Section 16 of the CDA, which completely rescinded the previous "final" regulations, and set forth new final regulations and a final disputes clause. Final Contract Disputes Regulatory Coverage and Contract Disputes Clause, 45 Fed. Reg. 31,035 (May 9, 1980). For the first time, the regulation included the restriction now found at FAR 33.207(c)(2), which purports to describe who must certify a claim on behalf of a non-individual contractor. OFPP described the restriction as a "technical" change "made to better reflect the intent of the Contract Disputes Act." *Id.* OFPP provided no opportunity for notice and comment on this change.[8]

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[8] This alone prevents the regulation from having the force and

It is clear from the foregoing that the assignment given to OFPP by Congress was narrow and specific and did not authorize OFPP's unfettered excursion into any other areas, and certainly not into subject matter jurisdiction of the contract appeals boards or the Claims Court. Moreover, it is equally clear from

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effect of law, since OFPP is required to follow notice and comment procedures. *See* OFPP Act, Pub. L. No. 93-400, 88 Stat. 796, 797 § 6(d)(2) (1974) and S. Rep. No. 93-692, 93d Cong., 2d Sess. at 1 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4589, 4601-02. But even if OFPP had been authorized to promulgate the regulation and had done so properly, the regulation conflicts with the legislation it purports to implement, and thus cannot have force or effect. *See United States v. Larionoff*, 431 U.S. 864, 873 (1977) ("regulations, in order to be valid, must be consistent with the statute under which they are promulgated"); *Sullivan v. United States*, 4 Cl.Ct. 70, 73 (1983) ("a regulation which is clearly incompatible with the statute under which it was ostensibly promulgated must give way"), *aff'd*, 742 F.2d 628 (Fed. Cir. 1984) (per curiam). There can be no doubt that the regulation conflicts with the CDA when the same certification can simultaneously be "clearly" invalid under the regulation yet clearly valid under the plain language of the CDA. *See Little River*, 21 Cl.Ct. at 534 (not reaching the issue of whether the certification regulation is valid or material to the court's jurisdiction because the contracts involved were not subject to the FAR). Under the CDA, Congress intentionally conferred statutory jurisdiction to the Boards so that *no* agency regulation or dispute clause requirement could alter their jurisdiction. *See, e.g., United States v. Sherwood*, 312 U.S. 584, 590 (1941) (a rule that purports to alter jurisdiction conferred by Congress is invalid); *Columbia Mfg. Corp. v. N.L.R.B.*, 715 F.2d 1409, 1410 (9th Cir. 1983) (same). *Cf. Linn Timber, Inc.*, AGBCA No. 89-194-1, 90-1 BCA ¶ 22,625 at 113,482 (1990) (refusing to enforce contract disputes clause requirement for certification of claims for less than $50,000 since "such an act is obviously the sole province of Congress"). Yet according to the decision below, whether or not a contract is subject to the FAR is a potentially dispositive jurisdictional inquiry.

the regulation's language and the context in which it was promulgated that OFPP itself intended merely to provide an interpretation of the CDA's dispute procedures for inclusion in agency contracts and rules—not to define the subject matter jurisdiction of the claims tribunals.

In these circumstances, the court below should not have deferred to the assumed judgment and expertise of the agency, but instead should have determined whether the limiting language of the FAR certification regulation could be squared with the statutory grant of subject matter jurisdiction to the contract appeals boards and the Court of Claims to adjudicate claims certified by the "contractor." Had the court done so, it never could have rendered the decision it did. This Court should, therefore, review and reverse that erroneous decision.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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